No. 96-2040

(2)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

KCAL-TV CHANNEL 9,

Petitioner,

vs.

LOS ANGELES NEWS SERVICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the Court of Appeals reported at 108 F.3d 1119 (9th Cir. 1997) reversing the district court's granting of summary judgment on behalf of Petitioner KCAL-TV, Channel 9, on the basis of the defense of "fair use" under the Copyright Act did take into consideration the fair use factors recognized by the Supreme Court, when it found that "fair use" was not the only conclusion a reasonable trier of fact could find in this case pertaining to the non-transformative and unauthorized broadcast by Petitioner of the video "Beating of Reginald Denny" taken by Respondent news organization during the 1992 Los Angeles Riots which was created by Respondent news organization for the specific purpose of licensing it to other news organizations for broadcast.

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

Petitioner KHJ-TV, Inc., dba KCAL-TV Channel 9, was the appellee in the Court of Appeals and the defendant in the district court. Respondent Los Angeles News Service was the appellant in the Court of Appeals and the plaintiff in the district court.

Respondent Los Angeles News Service is not related to any corporations.

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OPINIONS AND ORDERS BELOW

Respondent adds to the Petitioner's statement the July 1, 1997 order of the Court of Appeals denying the petition for rehearing *en banc* and rejecting the suggestion for a rehearing *en banc*. This order was filed on July 1, 1997 and is unreported. It is reprinted in the Appendix hereto. (Appendix A-25).

CONCISE STATEMENT OF THE CASE

A. INTRODUCTION

The present action is a copyright infringement case in which Respondent Los Angeles News Service, an Emmy winning independent news service, sued a Los Angeles television station, Petitioner KCAL-TV Channel 9, for its unauthorized, non-transformative, multiple uses of its video entitled "The Beating of Reginald Denny." The United States District Court granted summary judgment in favor of KCAL on the basis of the defense of "fair use" and Los Angeles News Service appealed. The Ninth Circuit in its published opinion of March 11, 1997 reversed the District Court's decision of summary judgment and remanded, finding that there was a question of material fact whether KCAL's use of the video was a "fair use" under 17 U.S.C. § 107. The Ninth Circuit, *sua sponte*, on April 17, 1997 ordered the parties to file briefs on whether the case should be reheard *en banc*. On July 1, 1997, the appellate court denied the petition for rehearing *en banc* and rejected the suggestion for a rehearing *en banc*.

B. CONCISE STATEMENT OF FACTS

Respondent wishes to point out to this Court that it believes the Petitioner set forth disputed facts as well as unsupported assertions of fact, while omitting important facts necessary for the Court's determination whether the appellate court reasonably examined the necessary factors to evaluate the copyright infringement defense of fair use. Respondent now sets forth these facts more fully with support from the record.

"CR" references are to the District Court record docket number; "ER" references are to the Excerpts of Record filed in the appeal.

A. The Parties.

1. LANS

LANS is a family owned, accredited independent news organization which since 1979, has covered news events with videotape, film and still photography. "Los Angeles News Service" is a fictitious business name used by Bob and Marika Tur, husband and wife. LANS provides news stories, photographs, still-photography, audiovisual works and print media works for the news media, reality shows, independent film makers and print media. [CR 32 at 2, ER 11].

LANS owns its own helicopter which permits LANS to obtain exclusive coverage of stories and to "get to the action faster" than by ground transportation and is the key to its survival in the very competitive Los Angeles news market. [CR 32 at 6-7, ER 11]. As of April 29, 1992,

LANS had nonexclusive contracts with KCOP Television and KNX News Radio and also sold videotape and news programming to all major networks, news magazines and many independent television news organizations. [CR 32 at 2, ER 11].

LANS operates in an extremely competitive industry. LANS must license videotape (and other visual work) to generate the revenue necessary to maintain its operations. For this reason, LANS retains the copyright for all of the works it creates. [CR 32 at 2-4, ER 11]. The marketing of LANS' copyrighted videotapes is necessary for the financial survival of LANS. [CR 32 at 3, ER 11].

2. KCAL.

KCAL is a Los Angeles commercial television station, broadcasting over Channel 9, which operates by generating revenue through advertising. [CR 33 at 3, ER 12; CR 39 at 3-4, ER 17].

B. LANS Creates The Denny Tape, the Copyrighted Videotape At Issue.

On April 29, 1992, Bob Tur learned from news sources that the intersection of Florence and Normandie Avenues would be a center of protest if the jury in the Rodney King beating case did not convict the four police officers on trial. When violence erupted after the verdict of acquittal was announced that day, Bob Tur and other LANS personnel flew to the intersection of Florence and Normandie Avenues. The LANS helicopter crew consisted of Douglas Denoff (pilot), Marika Tur (chief camera

operator), Bob Clark (still photographer) and Robert Tur, who directed operations and narrated the events being photographed. [CR 32 at 6-7, ER 11; CR 36 at 3-4, ER 15].

In order to make the copyrighted Denny Tape [CR 43, Tape Exh. 6A, ER 31], LANS was called upon to use all of its experience and creative talent. Bob Tur directed the movement of the LANS helicopter, instructing the pilot to fly in a counter-clockwise rotation over Mr. Denny. To create the videotape of the Denny Beating, LANS had to make numerous creative decisions: Bob Tur directed the pilot to decrease and increase altitude as needed to capture the Denny Beating on videotape, directed Marika Tur (the camerawoman), narrated events and watched for angles and areas that he wished Marika to cover with the videotape camera. These decisions had to be made quickly and accurately under tremendous pressure. [CR 36 at 4, CR 15].

The Turs utilized their years of experience to capture the Denny Beating on videotape. [CR 32 at 8, ER 11]. Just as in an earlier case involving LANS, "the witnesses described the initial decisions about the newsworthiness of the events and how best to tell the story succinctly and effectively; the selection of camera lens, angles and exposures; the choices of the heights and directions from which to tape and what portions of the events to film and for how long." *Los Angeles News*, 973 F.2d, *supra*, at 794. [CR 32 at 8, ER 11; CR 36 at 4, ER 15]. LANS won an Emmy Award for its coverage of the Denny Beating. [CR 36 at 4; ER 15].

C. KCAL's Repeated Unauthorized Broadcasts of the Denny Tape.

The Denny Tape was first broadcast "live" on KCOP (Channel 13) at approximately 6:30 p.m. on April 29, 1992. [CR 43, Tape Exh. 6A, ER 21]. The broadcast was viewed by KCAL personnel who decided to obtain and broadcast a videotape of that footage. [CR 34 at 2, ER 13]. That evening, KCAL requested a license from LANS to broadcast the Denny Tape, but LANS declined because KCAL had not paid LANS for videotapes that it had previously licensed. [CR 32 at 3, ER 11; CR 34 at 2-3, ER 13]. LANS did license the Denny Tape to other news organizations and it was broadcast widely through such authorized media. [CR 31 at 1, Exh. C, ER 10].

Nevertheless, KCAL procured the Denny Tape elsewhere and broadcast it repeatedly beginning the next day – on April 30 at 3:30 p.m. and 7:30 p.m., on May 1 at 8:03 p.m., 10:12 p.m. and 11:35 p.m. and on May 2 at 9:39 p.m. [CR 32 at 9-10, ER 11; CR 43, Tape Exh. 5, ER 21; CR 30, Tape Exhs. 1-4, ER 9]. Although KCAL, in moving for summary judgment, originally contended that only four unauthorized uses of the tape had been made on May 1 and 2, 1992 [CR 26 at 3, ER 4] LANS' opposition evidence demonstrated that KCAL had, in fact, broadcast the Denny Tape at least seven times. [CR 32 at 9-10, ER 11; CR 43, Tape Exh. 5, ER 21]. KCAL then grudgingly admitted that it had made seven unauthorized broadcasts, beginning on April 30, 1992 and continuing through at least September 14, 1992. [CR 47 at 4, ER 25].

KCAL claims that it received the tape from KCBS Television through the offices of KCBS' news director

Michael Horowicz. [CR 28, ER 7]. In a declaration submitted in opposition to KCAL's motion, Mr. Horowicz denied providing the tape to KCAL. [CR 41, ER 19]. LANS adduced evidence that KCAL had obtained the tape by intercepting or recording the original transmission by LANS' licensee KCOP-TV and a version of the Denny Tape delivered by KCAL to its tape marketing representative Film Bank contained the KCOP-TV logo slate. [CR 81 at 3, Tape Exh. 9A, ER 32]. If so, KCAL would have been in violation of 47 CFR § 73.1207 which prohibits rebroadcasts of previously transmitted programming without the written express authority of the originating station.

KCAL had a strong commercial motive to broadcast the Denny Tape on its commercially sponsored news programs when it did. (Commercials appear, inter alia, at TCR NOS. 20:13.501, 21:59.30; 23:18 and 21:41 on KCAL Tape Exhs. 1, 2, 3, 4, respectively, [CR 30, Tape Exhs. 1-4, ER 9]). A "sweeps" period for local television stations had begun on April 29, 1992. During a "sweeps" period, local television station ratings are calculated to provide a basis for setting advertising rates during the next three months [CR 32 at 4, ER 11].

KCAL made other, unauthorized uses of the Denny Tape as well. KCAL provided the Denny Tape to CONUS, a satellite news cooperative with 150 affiliate stations in the United States, which also distributes videotapes to Canada, England and Japan but this version displayed the KCAL logo superimposed on LANS' copyrighted Denny Tape. [CR 43, Tape Exh. 7, ER 21]. KCAL also distributed a doctored version of the Denny Tape to Film Bank, a corporation engaged in marketing videotapes on

behalf of KCAL, with the original narration by LANS' Bob Tur erased and replaced by the voice of KCAL's helicopter reporter and the sound of KCAL's helicopter dubbed in. [CR 43, Tape Exh. 3, ER 21; CR 32 at 5, ER 11].

D. LANS Lost A Sale To CONUS.

In April of 1992, at the time LANS created the Denny Tape, CONUS had been a client of LANS for 6 years, during which time CONUS regularly licensed films and videotape from LANS. In April and May 1992, LANS' attempts to license the Denny Tape to CONUS for satellite distribution to its affiliates had been, surprisingly, unsuccessful. Shortly after the Denny Beating, CONUS repeatedly refused to license the Denny Tape from LANS and claimed not to have distributed it via satellite network to its affiliates. [CR 80 at 3-5, ER 31].

However, the evidence showed that CONUS did, in fact, obtain the Denny Tape from KCAL and transmit it to its 150 affiliates without paying LANS a license fee since it received the Denny Tape from KCAL and not LANS. Also, KCAL provided the Denny Tape to Film Bank, a commercial film library, which has commercially exploited the Denny Tape, equally dividing the revenue from such unlicensed exploitation with KCAL. [CR 81 at 2-4, ER 32; CR 80 at 3-5, Tape Exh. 7, ER 31]. These facts showed that LANS did, in fact, lose at least one "potential sale or license" as a result of KCAL's conduct because KCAL, having surreptitiously obtained the Denny Tape, made it available to its affiliate, CONUS (a former LANS customer), for commercial distribution and Film Bank.

E. The Denny Tape Was Not "Unique" In That It Was Not The Sole Videotape Of The Denny Beating; KCAL Had Another, Inferior, Videotape Which It Elected Not To Use, Preferring The Denny Tape.

Film Bank provided LANS with access to all of Film Bank's videotapes and files. [CR 81 at 2-4, ER 32]. Among the newly available videotapes (which had not been produced in discovery by KCAL) were two tapes of particular importance that had been provided by KCAL to Film Bank: a recording, off the air, of KCOP's broadcast of the Denny Tape and another helicopter videotape of the Denny Beating that KCAL had acquired from KTTV. [CR 81 at 3, Tape Exhs. 9A, 9B, ER 32; CR 80 at 2, 6-7, ER 31]. This KTTV tape, provided to Film Bank by KCAL, showed that another helicopter news crew also videotaped the Denny Beating – although apparently from a much higher altitude. [CR 81 at 3, Tape Exh. 9B, ER 327 CR 60 at 2, 6-7, ER 31]. The newly discovered tape of the Denny Beating was not broadcast by KCAL [CR 80 at 6-7, ER 31] – perhaps, because it is inferior to the Denny Tape which KCAL did repeatedly use and which is the subject of this action.

REASONS FOR DENYING THE PETITION

A. SUMMARY OF ARGUMENT

In this copyright action, there is no conflict of decisions between the circuits or involving a question of exceptional importance. The present decision does not conflict with any other decisions of this Court on the

copyright issue of "fair use" nor is this decision one of such exceptional importance, either extending or limiting the "fair use" doctrine, to warrant the granting of the petition.

Moreover, the petitioner is in error when it argues the appellate court did not follow precedent. Here, the appellate court did not apply a "bright line" presumption as argued by the petitioner in evaluating whether KCAL's unauthorized and non-transformative use of LANS' video created by LANS for the very use which KCAL used the video, news reporting. Instead, an examination of the opinion shows the appellate court carefully examined all relevant factors for 'fair use" as determined by the Supreme Court, finding that in this case reasonable minds could differ as to the appropriateness of the application of the "fair use' defense and remanding it to the trial court for jury determination.

B. THE DECISION IS NOT IN CONFLICT WITH ANY PREVIOUS DECISION OF THIS COURT

Here, as demonstrated in the briefs below, there is no conflict within the circuits or in conflict with any decision of the Supreme Court regarding the copyright issue of "fair use" nor in the standard to sustain a summary judgment. 17 U.S.C. § 107. Here, the court simply agreed unanimously that a conclusion of "fair use" under the copyright act was not "the only reasonable conclusion a trier of fact could reach in this case." *Los Angeles News Service v. KCAL-TV Channel 9*, 108 F.3d 1119, 1123 (9th Cir. 1997). It therefore reversed and remanded the case to allow it to proceed to trial.

The Court reached this conclusion after a thorough analysis of the facts of this case, using Supreme Court authorities of *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S.Ct. 1164 (1994) and *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). It then applied the standard for summary judgment enunciated in *Hustler Magazine, Inc. v. Moral Majority, Inc.* of:

> If there are no genuine issues of material fact, or if, even after resolving all issues in favor of the opposing party, a reasonable trier of fact can reach only one conclusion, a court may conclude as a matter of law whether the challenged use qualifies as a fair use of the copyrighted work.

Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1150 (9th Cir. 1986).

Here, the court found that reasonable minds could differ when applying the standard, therefore summary judgment was inappropriate. No conflict within the circuit exists on the finding of "fair use" under the copyright act. 17 U.S.C. § 107. In fact, the only other authority on point is another case involving the same news organization, *Los Angeles News Service v. Tullo*, 973 F.2d 791 (9th Cir. 1992), which established a news photographer's productive use and rights under the Copyright Act, all of which do not conflict any decision of the Supreme Court or with any decision of any Circuit.

C. THE CASE DOES NOT SET A PRECEDENT OF EXCEPTIONAL IMPORTANCE

Respondent views the present decision as applying current law to the facts of this case with no precedential

extension nor limitation to the law on "fair use" under the Copyright Act. The factors set forth in the statutory basis for the "fair use" doctrine, 17 U.S.C. § 107, are not exclusive. The Court examined each of the factors, applying the standards set forth in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985). While some factors weighed in favor of the Petitioner, most factors weighed in favor of the Respondent. This alone demonstrated that the present case was not suitable for the granting of summary judgment, since reasonable minds could conclude there was no "fair use", thereby precluding summary judgment. *See Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1150 (9th Cir. 1986).

The present decision broke no new ground, nor did it enunciate factors which are out-dated or inapplicable to today's news broadcasting business. Moreover, no other circuits have appellate decisions which are in conflict with the case at bench regarding the issue of "fair use" under the Copyright Act.

While the Petitioner references several unpublished decisions which reached different conclusions, certainly they have no precedential value, nor would such decisions require Supreme Court review of the present decision, which reflects no conflict. KCAL's continued use of such dubious, and in any event, distinguishable, "authorities", to avoid the application of the legally determinative principles of fair use, must be rejected.

One unpublished opinion is heavily relied upon by the Petitioner. *Mathieson v. Associated Press*, 23 U.S.P.Q. 2d

1685 (S.D.N.Y. 1992), an unpublished decision by a District Court in New York, is the sole reed upon which KCAL floats its key argument that a finding of a "news reporting purpose" is, in effect, dispositive of the first ("purpose and character of use") fair use factor. This is clearly wrong and contrary to the Supreme Court's directives as shown below.

D. THE DECISION IS NOT IN CONFLICT WITH ANY EXISTING OPINION OF ANOTHER COURT OF APPEALS OF NATIONAL APPLICATION WHICH REQUIRES NATIONAL UNIFORMITY

While the Copyright Act is applied nationally, there is no conflict of decisions in any circuit regarding the factors to be considered for a finding of "fair use" under the Act, nor is there any conflict that news reporting is only one factor for the court to consider in making its determination. The appellate court used the standard set forth by the Supreme Court in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985), which examined the present statute in detail. Respondent faced the same argument in a previous case. "Even if [defendant's] characterization of its purpose [as news reporting] was correct, it would not be dispositive", *Los Angeles News Service v. Tullo*, 973 F.2d 791, 797 (9th Cir. 1992). In so holding, the Court quoted from the Supreme Court's *Harper & Row* decision as follows:

> News reporting is one of the examples enumerated in Section 107 to 'give some idea of the sort of activities the courts might regard as fair use

> under the circumstances.' This listing was not intended . . . to single out any particular use as presumptively a 'fair' use . . . the fact that an article arguably is 'news' and therefore a productive use is simply on factor in a fair use analysis.

Ibid. at 797 citing *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 561, 105 S.Ct. 2210, 2231, 85 L.Ed.2d 588 (1985).

Two years later, the Supreme Court again affirmed the need to examine the "fair use" factors without a "bright line" presumption, as the Petitioner argues should be given to news reporting uses. In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S. Ct. 1164, 127 L.Ed.2d 500 (1994) the Supreme Court examined whether a commercial parody of a well known song could be a fair use. The court stated, in a particularly apt example for the present case,

> Like a book review quoting the copyrighted material criticized, parody may or may not be a fair use, and petitioner's suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair, see *Harper & Row*, 471 U.S. at 561.

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 114 S. Ct. 1164, 127 L.Ed.2d 500, at 517 (1994).

Here, the appellate court did not, contrary to the assertion of Petitioner, presumptively apply bright line tests for any "fair use" factor. In reality it is the Petitioner who wants this Court to recognize a presumption of fair use whenever a work is used for news reporting, contrary

to the legislative intent of the Copyright Act and the common law. *See Harper & Row*, 471 U.S. at 561.

KCAL added nothing new to the LANS video, it simply appropriated it and used it for the purpose it was created, news reporting. KCAL's brief does not address in any convincing fashion the argument that KCAL's use of the Denny Videotape was "nontransformative", and hence not within "the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright," *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S. Ct. 1164, 1171, 127 L.Ed.2d 500 (1994). Here KCAL's news reporting was nothing more than copying and rebroadcasting LANS' own news reporting, which if allowed would destroy LANS' market for its work. *See Harper & Row*, 471 U.S. at 569.

The 9th Circuit Court examined the "fair use" factors, found that reasonable minds could differ on the use by KCAL of the appellant's work, applying present law, and reversed and remanded. The court did not utilize decisional law from other jurisdictions which was in conflict, since there really is no conflict between the circuits. It applied present law about which there is no conflict in reaching its decision. There is no need for the Supreme Court to resolve any conflict either within the circuit or in other circuits.

E. FIRST AMENDMENT CONSIDERATIONS IN THIS CASE DO NOT OVERRIDE THE PURPOSE OF THE COPYRIGHT ACT

Finally, Petitioner argues that the court of appeal did not address its claim the First Amendment offered protection from copyright infringement, a claim that was not reached in the district court.

KCAL is unable to reference any case which held that the First Amendment allows one news organization to bodily appropriate another's copyrighted work and thereby compete directly with the licensed use of that work. Such a First Amendment defense to a copyright infringement claim was considered, at length, and rejected, in Respondent's earlier case in *Los Angeles New Service v. Tullo,* 973 F.2d 791 (9th Cir. 1992) which is entirely applicable to this case as well. The appellate court again applied precedential authority when it stated:

> Copyright law incorporates First Amendment goals by ensuring that copyright protection extends only to the forms in which ideas and information are expressed and not to the ideas and information themselves. '[T]he idea-expression dichotomy . . . serves to accommodate the competing interests of copyright and the First Amendment. The "marketplace of ideas" is not limited by copyright because copyright is limited to protection of expression.' *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp. ("Krofft")*, 562 F.2d 1157, 1170 (9th Cir. 1977); see also *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556, 105 S.Ct. 2218, 2228, 85 L.Ed.2d 588 (1985) ('copyright's idea/expression dichotomy "strike[s] a definitional balance

> between the First Amendment and the copyright Act by permitting free communication of facts while still protecting an author's expression" ' (citation omitted).

Los Angeles News Service, 973 P.2d, *supra*, at 795.

Petitioner argues that Professor Nimmer's thesis that certain events may be so newsworthy that public access must override a copyright holder's attempt to resist dissemination, even if accepted as a possibility, has no application here. In language fully applicable to the present case, the earlier appellate case concluded,

> [B]ecause the record establishes that LANS's tapes were shown on local television programs immediately after the events and thus were freely available to the public, we conclude the problem perceived by Professor Nimmer was not present in this case, and we reject, as indeed would Professor Nimmer, AVRS's contention that the First Amendment precludes liability for infringement of LANS's copyrights.

Los Angeles News Service, 973 F.2d *supra* at 796 (emphasis added). The record here also supports that the public was not deprived of this videotape since it was broadcast live and on tape and licensed to other stations for broadcast. Petitioner did not obtain a license because it did not pay previous licenses, not that LANS tried to embargo the video.

In the previous Los Angeles News Service case, as it is still true today, "no court has adopted Nimmer's proposal" and "those that have discussed it have found it inapplicable to the facts before them." *Los Angeles News Service*, 973 F.2d, *supra* at 796 n.5. The undisputed facts

presented herein demonstrate that "the problem perceived by Professor Nimmer [is] not present in this case". Simply put, any First Amendment interest at issue, the "public's First Amendment right of access to information", *Los Angeles News Service*, 973 F.2d, *supra* at 795 – not any right of KCAL's, – was not jeopardized here. In the present case, the record is clear that the copyrighted video was made available. LANS would not license it to KCAL because KCAL, a former customer, refused to pay its bills. The copyrighted Denny Tape was broadcast by numerous authorized licensees and was therefore made "freely available to the public". The Denny Tape was made widely available to the public through news media sources licensed by LANS, which were prepared to honor their. contractual obligations to LANS. The public's First Amendment interest in the Denny Tape was more than adequately served here.

CONCLUSION

As demonstrated above, the present Court's decision of March 11, 1997 does not meet the showing needed for a grant of certiorari: (1) the decision of the panel is not in conflict with any previous decision of this court; (2) the case does not set a precedent of exceptional importance; (3) the decision is not in conflict with any existing opinion of another court of appeals of national application which requires national uniformity; and (4) no factors warrant the proposed defense of the First Amendment to the infringement in this case.

Respondent requests this Court to deny Petitioner's Writ of Certiorari in its entirety and allow Respondent to pursue its remedies before a jury in the district court.

Dated: July 28, 1997

Respectfully submitted

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOS ANGELES NEWS SERVICE, Plaintiff-Appellant, v. KCAL-TV CHANNEL 9, Defendant-Appellee.	No. 95-55261 D.C. No. CV-92-04247-RG ORDER (Filed Jul. 1, 1997)

Before: BRUNETTI and RYMER, Circuit Judges, and TANNER,* District Judge.

The panel has voted to deny the petition for rehearing. Judges Brunetti and Rymer vote to reject the suggestion for rehearing en banc and Judge Tanner so recommends.

The full court has been advised of the suggestion for en banc rehearing. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

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* Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.